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CURRENT TOPICS

Royal Commission on Taxation: Second Report

THE publication this week of the second interim report of the Royal Commission on Taxation (Cmd. 9105; 4s. 6d.) discloses no recommendations of a revolutionary kind, but is nevertheless full of interest, not merely for the taxation specialist but also for the general run of professional men. The Report deals with that part of the Commission's terms of reference which required them to consider the present system of personal allowances, reliefs and rates of tax as a means of distributing the tax burden fairly. As a preliminary to this consideration, the first part of the Report is devoted to an examination of certain schemes for replacing the present income tax in part by some simpler form of tax: this part is not of great interest for present purposes, and it suffices to note that the Commission reject them. On the main subject of the Report, the Commission conclude that taxation of personal incomes should be progressive and that the existing means of graduation and differentiation (i.e., personal reliefs, reduced rate reliefs, graduated sur-tax, and earned income relief) are satisfactory. They do, however, suggest a number of important modifications of the present rules, the general effect of which would be to alleviate the burden on families in the middle income range. Among these may be noted: a graduated child allowance rising from £85 for incomes not exceeding £850 to £100 plus 6 per cent. of the excess of the income over £1,000, subject to a maximum of £160; sur-tax should be imposed on incomes of £1,500 and upwards where the taxpayer is single, £2,000 and upwards where the taxpayer is married but without children, and at a starting point of £2,000 plus £160 for each child in the case of the married taxpayer with a family; the upper limit of earned income relief should be raised from £2,025 to £2,500 and the relief should be extended at half the full rate to the slice of income between £2,500 and £3,000.

Grants for Improving Old Houses

A CIRCULAR issued by the Minister of Housing and Local Government deals with the grants under the Housing Act, 1949, to facilitate improvement and conversion of houses. The minimum estimated cost of improving or converting a dwelling before it can qualify for grant has been reduced from £150 to £100, and reasonable expenditure on the professional fees of architects, surveyors and engineers may now be included in the costs which rank for grant. Local authorities will no longer have to refer private owners' applications for grant to the Ministry, but may themselves give approval. Revised requirements of grant are mainly sanitary. It is emphasised that, as stated in a 1949 circular, the financial resources of a private owner are wholly irrelevant to the question whether a grant should be made. The circular adds that in view of the provision made in the Housing Repairs and Rents Bill to remove altogether the upper limit of £800 laid down in the Act of 1949, the Minister is willing, on the application of a local authority, to consider using, now, his power under that Act to waive the upper limit for any individual scheme, although the grant will not normally exceed £400.

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Local Government Reform

FIFTEEN university teachers of politics and public administration signed a letter to *The Times* of 20th April, urging the need for the reform of local government. Any scheme, they wrote, should take into account the problem as a whole, not just areas or functions or finance or organisation. They agreed that a report within twelve to eighteen months of setting up a commission or committee would be possible if an adequate investigating staff was provided and if sub-committees were used and a time limit set. The inquiry would be shortened by the material already available, the Boundary Commission reports, the various proposals for reform, and fact-finding reports regarding, for instance, the equalisation grants. Thus would be avoided the danger of "a makeshift compromise between the proposals of local authority associations who are the interested parties in the matter." Such an outcome seems to be the great danger of the present divergence of views. The arbiter must promote reforms which are in the public interest, and must be free from the taint of parochialism.

Family Businesses: Rate of Estate Duty

IN the light of the proposals described in the article below, the comments of the *Financial Times* on the Chancellor's proposals for family businesses are of interest. The writer begins, somewhat cryptically, "Generosity, like justice, suffers from the disability that not only must it be done, but it must be manifestly done." In the course of making manifest the extent of the Chancellor's generosity, the writer pointed out that "it was fairly accepted that, as a result of legislation passed in 1940, the family business was facing virtual extinction in a matter of a generation or two." The obvious reason for this, he said, was that the valuation of the shares on the owner's death as the basis of the value of the company's assets, less liabilities, automatically meant the highest possible value and the highest rate of estate duty. Instead of abolishing the asset-value basis of valuation, the Chancellor, according to the writer, has conceded "something quite substantial" in scaling down the rate of duty by 45 per cent. in respect of industrial premises, plant and machinery used for business. Investments, stock and cash will bear duty at the full rate, and the writer pointed out that this will mean real ploughing back of profits in the next few years in order to attract the concession. The survival of the family business, and indeed its prosperity, are proper aims of a Chancellor's benevolence. At a time when caution is still the mainspring of budgetary policy, it is not surprising that the Chancellor can do no more than give family businesses the chance to help themselves. The advantage, if it prove to be one, will be mainly in favour of manufacturing concerns; retail distributing businesses will not, it seems, benefit substantially. Whether the incentive will on the whole be effective to any worth while extent remains to be seen. It may well be doubted whether the parallel between generosity and the justice which must be manifestly seen to be done is fully borne out in this case.

Taxation

THE FINANCE BILL, 1954, AND ESTATE DUTY

INDUSTRIAL PREMISES, PLANT, ETC.

IT is proposed by cl. 25 to grant a considerable relief in respect of estate duty which is payable on industrial premises, machinery and plant. Subject to the qualifications and limitations mentioned below, estate duty will be charged thereon at 55 per cent. only of the rates which would otherwise be applicable thereto. The general similarity to the well-known relief in respect of agricultural land will be apparent.

Industrial premises and hereditaments qualifying for the reduced rates are those which are treated as such for rating purposes, and no doubt, although the Bill is silent on the point, the eligibility of machinery and plant will be governed by the same considerations as govern the grant of capital allowances under the Income Tax Act, 1952, Pt. X. There is a provision for apportionment where land or premises are occupied partly for industrial and partly for other purposes.

No relief is available where the premises or plant are used in a business carried on in exercise of a profession or vocation or carried on otherwise than for gain, and no relief is available where at the date of death there is a binding contract for the sale of the business unless it is a sale to a company formed for the purpose of carrying it on made in consideration wholly or mainly of shares in that company: similarly, where the relief would otherwise have extended to assets used in a business carried on by a company, there will be no relief if the company is in liquidation except it be liquidation with a view to reconstruction or amalgamation.

The relief applies to businesses carried on by the deceased alone or in partnership with another, and its application to partnerships does not, as does the relief in respect of agricultural land, depend upon the mode in which the assets of the partnership are divisible on dissolution. Furthermore, and this is markedly different from the case of agricultural land, the relief can be had, on the death of a shareholder in a company, in respect of an aliquot part of the industrial premises or plant, etc., used in a business carried on by the company. This is only the case, however, in so far as shares in the company pass on the death and fall to be valued under the provisions of the Finance Act, 1940, s. 55, and not under the provisions of the Finance Act, 1894, s. 7, or in so far as some part of the actual assets of the company is deemed to pass by reason of the Finance Act, 1940, s. 46.

CONTROLLED COMPANIES

The Bill contains almost six pages amending in one way or another the provisions of the Finance Act, 1940, relating to controlled companies. This legislation is by now so excessively complex that it is thought that there is little gain to be had from an attempt to summarise these latest proposals here. Those few who can claim some rough sort of knowledge of this subject (and there can be few rash enough to claim any more when judges have been tempted to reject the provisions as incomprehensible) will wish to consider the proposals themselves and in detail.

AGGREGATION

Small Estates

It will be recalled that under the existing law, if the net value of property, excepting property settled otherwise than by the will of the deceased, does not exceed £2,000, it is, by the Finance Act, 1894, s. 16 (3), exempted from aggregation, and since under the current scale of duties an estate under £2,000 is not chargeable with any estate duty, the result is that

where the unsettled estate does not exceed £2,000 it escapes duty entirely. There are three particular points about the existing exemption which may be mentioned before the new proposals are examined. Firstly, in computing the value of the unsettled property it is necessary to include property which is itself exempt from duty upon other grounds. Secondly, by concession, certain items of property, notably interests in expectancy, entailed property in most cases, and joint property passing by survivorship, may be treated as either settled or unsettled at the option of the taxpayer. Thus, if there is, say, an interest in expectancy worth £500 and if the free property is, say, £1,400, that interest will be included as unsettled so that it will itself go free: if the unsettled property had been, say, £1,600, the interest in expectancy would be treated as settled so as not to deprive the unsettled property of the advantage of non-aggregation. Thirdly, there is no sort of marginal relief.

By cl. 29 of the Bill it is proposed to repeal the Finance Act, 1894, s. 16 (3), and to substitute a new subsection to apply to deaths occurring after the commencement of the Bill as enacted. The first difference between the old and the new provisions is that the total of the unsettled property which may be exempted from aggregation is increased from £2,000 to £10,000, but the benefit of this apparent concession to the taxpayer is very considerably diminished in that a great deal of settled property must now be included with the unsettled estate in considering whether that latter is within the limit of exemption. As before, one must include property which is itself exempted upon other grounds, but whereas under the existing law there could be excluded all settled property other than that settled by the will of the deceased, there must in the future be included in the free estate—

all property settled by the deceased, whether by will or *inter vivos*;

all property comprised in a settlement made directly or indirectly on behalf of the deceased or at the expense of the deceased or out of funds provided by the deceased;

all property of which the deceased has been competent to dispose and of which he has disposed by the exercise by his will or otherwise of a power conferred by the settlement or which devolves on his personal representatives as assets for the payment of his debts.

It will be seen that the new provisions will in some cases be more and in other cases be less beneficial to the taxpayer. It is at present doubtful how far the existing concessions will continue to be applied, and it is to be hoped that some statement clarifying the position will be issued before the Bill is enacted. It seems reasonably clear, however, that property which has, within five years of the death, been given to joint tenants must be included in the unsettled estate, because if it is settled it has been settled by the deceased: similarly, joint property passing by survivorship must be so included if it was provided by the deceased.

Finally, it is proposed that there shall be marginal relief where the value of the unsettled property, including those species of settled property mentioned above, only slightly exceeds £10,000.

Policies of Assurance

Although the proposals on this matter are short and simple enough, the taxation of policies of assurance which do not form part of the free estate of the deceased is an involved matter, and it may be helpful to recapitulate very briefly the circumstances in which such policies may be chargeable but yet escape aggregation.

(1) Where the deceased has effected a policy for the benefit of another so that (i) that other takes the benefit for good or valuable consideration (e.g., if the policy forms part of a marriage settlement), and (ii) no beneficial interest, however small, arises on the death of the deceased, then no estate duty whatever is payable on the policy, so that questions of aggregation do not arise.

(2) Where the deceased has effected such a policy for the benefit of another so that either or both the above conditions are not satisfied, there will be a charge to duty under the Finance Act, 1894, s. 2 (1) (*c*), as a policy kept up for a donee, or s. 2 (1) (*d*), as a policy purchased or provided by the deceased (if *A.-G.* v. *Murray* [1904] 1 K.B. 165 is correctly decided). But in either case the policy will be exempt from aggregation by the proviso to the Finance Act, 1894, s. 4, if it can be said that the deceased never had an interest in the policy. To ensure that he never had an interest it is essential to see: firstly, that the policy is held in trust for the beneficiaries from the start; secondly, that the trusts exhaust the whole of the beneficial interests in all eventualities so that there is no possibility of a resulting trust for the deceased. Commonly, the machinery of the Married Women's Property Act, 1882, s. 11, is employed in the matter.

(3) Where the deceased has not himself effected such a policy, but where it has been effected by trustees out of money provided by the deceased, the question of aggregation or no aggregation depends partly upon whether the policy is brought into charge by the Finance Act, 1894, s. 2 (1) (*c*), or by s. 2 (1) (*d*). If the former is the case, then the policy will escape aggregation if it can be shown that the deceased never had an interest: if the latter, then he will be deemed to have had an interest by the Finance Act, 1939, s. 30. Clearly, of course, the method of ensuring that the policy shall be chargeable only under s. 2 (1) (*c*) and not under s. 2 (1) (*d*) is to ensure that no beneficial interest accrues or arises on the death.

After the proposals in the Bill are enacted, all the above principles will still apply to exempt policies in which the deceased neither had nor is deemed to have had any interest from aggregation with the generality of his estate. The difference is that they will in the future be aggregable with each other. That is to say, ten policies each of £2,000 will attract the same amount of duty as one policy of £20,000, but that £20,000 will be an estate by itself. In ascertaining the rate applicable to the policies it is not necessary to include policies which are exempt from duty entirely.

Thus, suppose *A's* estate to be made up as follows: general estate, £10,000; one policy kept up for a donee under a marriage settlement with no beneficial interest arising therein on the death, £5,000; five policies written under the Married Women's Property Act, 1882, s. 11, with no resulting trust for the deceased, £3,000 each. If *A* dies before the proposals in the Bill come into force, estate duty will be payable on the free estate at 4 per cent.—£400—and on the five policies at 1 per cent.—£150. Total duty payable, £550. If *A* dies after the proposals are enacted, duty will be payable on the free estate as before, and on the five policies at the rate applicable to a free estate of £15,000, i.e., at 8 per cent.—£1,200. Total duty payable, £1,600. Observe that the policy for £5,000 does not enter into either computation, and that notwithstanding the new proposals there is still a saving to be had: with no exemption at all from aggregation duty would have been £3,000.

G. B. G.

Mr. G. J. Strickland, retired solicitor, of Bloomsbury Square, London, W.C.1, left £42,206 (£42,093 net).

Mr. V. G. H. Hicks, solicitor, of East Dereham, Norfolk, left £38,003 (£37,572 net).

MORTGAGES BY OWNER-OCCUPIERS

THIS article is prompted by a passage in the judgment of Sir Raymond Evershed, M.R., in *Nichols* v. *Walters* [1954] 1 W L.R. 1; *ante*, p. 10, where his lordship said (at p. 3): "It is said by the mortgagees that s. 7 is inapplicable as between mortgagee and mortgagor where the mortgaged premises are in the hands of their freehold owner. I think that that question is open to doubt, and I prefer to express no opinion about it." The s. 7 to which his lordship refers is s. 7 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the marginal note of which is "Restriction on calling in of mortgages."

Nichols v. *Walters* was a case where a freeholder in possession of premises comprising business and living accommodation, which she occupied herself, mortgaged them for a loan of £2,200. At the date of the mortgage, and ever since, the premises had not been let to anyone, either in whole or in part. The mortgagees having called in the principal, and the borrower having fallen more than twenty-one days into arrear with the payment of interest, the mortgagees sought an order for possession. It was held, applying *Evans* v. *Horner* [1925] Ch. 177, that, assuming s. 7 applied to the mortgage, as the borrower had fallen into arrear in the payment of interest for more than twenty-one days, she had lost the protection of s. 7 and did not regain it by paying off the arrears. An order for possession had been rightly made.

The purpose of this article is not to discuss *Nichols* v. *Walters* but to express an opinion on whether or not s. 7 of the 1920 Rent Act applies where the mortgaged premises are in the hands of their freehold owner. In this article the expression "old control" will be used to indicate those houses subject to rent control prior to the Rent and Mortgage Interest Restrictions Act, 1939, and the expression "new control" will be applied to houses brought under control by that Act.

Statutory provisions

The relevant parts of s. 7 of the 1920 Act provide that: "It shall not be lawful for any mortgagee under a mortgage to which this Act applies, so long as [interest is paid, the covenants are performed and the property is kept in repair] to call in his mortgage or to take any steps for exercising any right of foreclosure or sale, or for otherwise enforcing his security or for recovering the principal money thereby secured." This prohibition is qualified by provisos excluding from the operation of the section, *inter alia*, mortgages where the principal money is repayable by means of periodical instalments extending over a term of not less than ten years from the creation of the mortgage—this particular exception covers most building society mortgages.

The next step is to ascertain what is meant by the expression "a mortgage to which this Act applies." The definition section of the 1920 Act is s. 12, which enacts in subs. (4):—

> "Subject to the provisions of this Act, this Act shall apply to every mortgage where the mortgaged property consists of or comprises one or more dwelling-houses to which this Act applies, or any interest therein, except that it shall not apply—
>
> (*a*) to any mortgage comprising one or more dwelling-houses to which this Act applies and other land if the rateable value of such dwelling-houses is less than one-tenth of the rateable value of the whole of the land comprised in the mortgage; or
>
> (*b*) to an equitable charge by deposit of title deeds or otherwise; or
>
> (*c*) to any mortgage which is created after the passing of this Act."

In the case of new control houses, s. 12 (4) (*c*) does not apply (see Sched. I to the 1939 Act).

In the case of old control houses, s. 12 (2) of the 1920 Act defines the expression "dwelling-house to which this Act applies" in the following terms:—

> "This Act shall apply to a house or a part of a house let as a separate dwelling, where either the annual amount of the standard rent or the rateable value does not exceed" certain limits.

In the case of new control houses, s. 12 (2) of the 1920 Act does not apply (see Sched. I to the 1939 Act). The relevant provision for new control houses is s. 3 (1) of the 1939 Act:—

> "Without prejudice to the operation of the two preceding sections in relation to any dwelling-house to which the principal Acts applied immediately before the commencement of this Act, the principal Acts . . . shall, subject to the provisions of this section, apply to every other dwelling-house of which the rateable value on the appropriate day did not exceed [here follow the rateable values] and in relation to any such dwelling-house as aforesaid, not being a dwelling-house to which the principal Acts applied immediately before the commencement of this Act, the provisions of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1933, set out in the first column of Sched. I to this Act shall have effect as if there were made in those provisions the modifications respectively prescribed by that Schedule."

The interpretation section (s. 7) of the 1939 Act does not, in terms, define a "dwelling-house." It defines "agricultural land," "rateable value on the appropriate day" and "the appropriate day," and continues:—

> "and other expressions have the same meanings as in the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933."

In the interpretation section of the 1933 Act (s. 16), the following definition is found:—

> "In this Act, unless the context otherwise requires . . . 'dwelling-house' has the same meaning as in the principal Acts, that is to say, a house let as a separate dwelling or a part of a house being a part so let."

Looking at these provisions on their own, without regard to authority, and uninfluenced by the views of text-book writers, it is submitted that s. 7 of the 1920 Rent Act does not apply when the original mortgagor is a freeholder in possession because (1) in the case of an old control house, s. 12 (4) of the 1920 Act only applies that Act to mortgages where the mortgaged property is a dwelling-house to which the 1920 Act applies, and the 1920 Act only applies to a house *let* as a separate dwelling-house; and (2) in the case of a new control house, s. 3 (1) of the 1939 Act applies the provisions of the 1920 Act (with modifications not presently material) to every dwelling-house (within certain limits of rateable value) not being a dwelling-house to which the principal Acts apply, and a dwelling-house is, by the combined effect of s. 7 (1) of the 1939 Act and s. 16 (1) of the 1933 Act, a house that is *let* as a separate dwelling.

The views of the text-book writers

Support for the above view can be found in all the leading text-books. The following opinions may be cited: Blundell's Rent Restrictions Guide, 3rd ed. (1949), p. 128:—

> "The subject-matter of the mortgage must . . . be a dwelling-house within the Acts and this involves, *inter alia*, the important requirement that the dwelling-house . . . must be let."

Lloyd and Montgomerie, Rent Control (1949), p. 175, notes (*a*) and (*b*):—

> "The Acts therefore give no protection to a mortgagor who is owner occupier."

Law Notes Rent and Mortgage Interest Restrictions, 22nd ed. (1951), p. 85:—

> "If, therefore, the owner of a dwelling-house who is in personal occupation of the house, creates a mortgage on it, he obtains no protection from the Acts."

Megarry, The Rent Acts, 7th ed. (1953), p. 459:—

> "The Acts will not apply to a mortgage of a house which is occupied by the owner . . . for the house is not 'let as a separate dwelling' and so is not within the Acts."

Key and Elphinstone, Precedents in Conveyancing, 15th ed. (1953), vol. 2, p. 1:—

> "The Acts do not apply to the ordinary case of an owner occupier mortgagor."

A warning must, however, be given at this point. The mortgage must have been created by the owner-occupier (see the extract from the *Law Notes* book quoted above). There is some doubt as to the position in exceptional cases, as where, for example, the tenant of a house subject to a mortgage to which the Acts apply (the mortgage having been created by his landlord) buys from the landlord the freehold, that is, his landlord's equity of redemption. The former tenant is not in this case the original mortgagor, having bought the freehold subject to the mortgage.

Section 12 (6) of the 1920 Act, which applies to both old and new control houses, provides that:—

> "Where this Act has become applicable to any dwelling-house or any mortgage thereon, it shall continue to apply thereto, whether or not the dwelling-house continues to be one to which this Act applies."

Because of this subsection, it is thought probable that in exceptional cases, as that mentioned above, the Acts, having once applied to the mortgage, will continue to apply, notwithstanding that the mortgaged premises are subsequently in the hands of the owner of the freehold.

The cases

The views of the text-book writers have, of course, only persuasive authority. They have been referred to first in this article because one of the most significant features of the present discussion is the almost complete absence of judicial authority on the point. In *Woodifield* v. *Bond* (*No.* 1) [1921] W.N. 309 Sargant, J., held that s. 7 of the 1920 Act did apply where the owner-occupier was the mortgagor. But this decision would appear of little value at the present day as it was based on an interpretation of s. 12 (2) of the 1920 Act inconsistent with that placed on the subsection by the Court of Appeal in *Schaffer* v. *Ross* [1940] 1 K.B. 418, and also inconsistent with the definition of "dwelling-house" in s. 16 (1) of the 1933 Act.

In *Kirk* v. *Cunnington* [1921] 3 K.B. 637 it seems clear that the property was let. In *Evans* v. *Horner* [1925] Ch. 177 there is no mention in the report as to whether the dwelling-house was let or not: in either event the point under discussion was not taken.

Although building societies (whose mortgages require repayments of capital, as a rule) and banks (where the mortgage is frequently in the form of an equitable charge by deposit of title deeds) to some extent avoid being caught by the provisions of s. 7 of the 1920 Act, they are certainly not the only lenders. There must have been many cases where (if applicable to owner-occupiers) the provisions of s. 7 could have been invoked by a mortgagor against whom a possession order has been sought. There does not appear to have been a single reported case during the last thirty-three years, apart from *Nichols* v. *Walters*, *supra*, where the attempt has been made by a mortgagor or his advisers to raise directly the question discussed in this article.

Conclusion

It is submitted that the doubt expressed by the learned Master of the Rolls in *Nichols* v. *Walters*, *supra*, must be confined to those exceptional cases where the property was let when the mortgage was created, and the freeholder now in possession did not create the mortgage; and that, in general, the law is that, in the case where there is a mortgage of premises and the mortgagor is the owner-occupier who created the mortgage, s. 7 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, does not apply.

H. N. B.

CATTLE TRESPASS AND THE SCIENTER RULE

WHEN the Committee on the Law of Civil Liability for Damage done by Animals (presided over by the Lord Chief Justice, Lord Goddard) made its report (Cmd. 8746) on, *inter alia*, the liability for cattle trespass, it was stated (para. 3) that a person can recover damage done to his land and crops by trespassing cattle irrespective of negligence on the part of the owner, but that in the absence of *scienter* he cannot recover for damage to the person whether caused to himself or his servants. The Committee considered that the question whether, in the absence of *scienter*, the owner of a trespassing animal is liable for the injury it may do to other animals or goods that are on the land cannot be regarded as settled, and must be regarded as open to doubt—see *Manton* v. *Brocklebank* [1923] 2 K.B. 212.

The recent decision of the Court of Appeal (Lord Goddard, C.J., Singleton and Hodson, L.JJ.) in *Wormald* v. *Cole* [1954] 2 W.L.R. 613; *ante*, p. 232, contradicts the assumption of the Committee that the presence of *scienter* is necessary before the owner of cattle is liable in cattle trespass for damages for personal injury. In that case the appellant plaintiff suffered severe personal injuries as a result of the defendant's cows (known to be of a placid disposition) trespassing on her land. In the darkness she was knocked down whilst trying to evict them from the drive of her house. The Court of Appeal held that the defendant was liable to the plaintiff in damages for cattle trespass in the absence of *scienter*, i.e., due to the animals' natural propensity.

In coming to this decision the Court of Appeal was following a long and seemingly conflicting line of authority. The law relating to cattle trespass has been developed from the fourteenth century along somewhat anomalous lines. Under the old practice the wrong of allowing cattle to stray on to

another's land was dealt with by the writ of trespass. To drive them there is a true trespass, but to allow them to get there in default of fencing is a nuisance and the remedy should have been in case. However, the liability has remained an absolute one independent of negligence. Provided the initial act constituted a trespass to the occupier's land, the defendant must bear the resulting damage. In *Smith* v. *Cook* (1875), 1 Q.B.D. 79, Blackburn, J., said that the law had been settled by authority rather than by reason.

Attempts have been made to restrict the absolute character of the action in cattle trespass by the introduction of the *scienter* rule, that is that the owner or keeper was liable only if it could be proved that the particular animal which caused the damage had a vicious propensity—a rule which distinguishes animals *mansuetae naturae* from those *ferae naturae*, absolute liability being imposed on their keeper in the case of the latter. The propensity of an animal to do the particular kind of damage which is in fact done is relevant only as connecting the injury with the trespass and preventing the damage from being too remote (see Salmond on Torts, 11th ed., p. 661). Thus in *Lee* v. *Riley* (1865), 18 C.B. (N.S.) 722, where the defendant's mare strayed on to the plaintiff's land through defective hedges, kicked the plaintiff's horse and killed it, the defendant was liable for damages in cattle trespass, although there was no evidence adduced to show that the horse was savage. It was argued at the trial as to whether the defendant had knowledge of the ferocious disposition of his mare, but Erle, J., pointed out (pp. 733–4) that, however relevant it may have been in a *scienter* action, it was beside the mark in one for cattle trespass. This principle was followed in *Ellis* v. *Loftus Iron Company* (1874), L.R. 10 C.P. 10 (the owner of a stallion which had put its head and feet over the plaintiff's fence and kicked the plaintiff's mare had committed a technical trespass and was liable in damages), and in *Theyer* v. *Purnell* [1918] 2 K.B. 333 (injury to sheep infected by trespassing animals). It was distinguished in *Cox* v. *Burbidge* (1863), 13 C.B. (N.S.) 430 (where proceedings brought by the plaintiff for injuries inflicted by the defendant's straying horse failed in the absence of *scienter*—they could not be brought in cattle trespass as the plaintiff had no property in the soil of the highway), and in *Manton* v. *Brocklebank* [1923] 2 K.B. 212 (where a horse and mare were lawfully in the same field, there was therefore no trespass and no liability in the absence of *scienter*).

These authorities were amongst those reviewed by Lord Goddard, C.J., in *Wormald* v. *Cole*, *supra*, and he came to the conclusion that this case could not be distinguished from *Lee* v. *Riley*, *supra*. At p. 619 he states: "The action of the heifer was not due to, or characteristic of, vice or ferocity, and the words of Erle, C.J., 'The animal had strayed from its own pasture; and it was impossible that her owner could know how she would act when coming suddenly in the night-time into a field among strange horses,' seem exactly to fit the case if one substitutes strange humans for strange horses." All the learned judges distinguished *Searle* v. *Wallbank* [1947] A.C. 341, where Lord Du Parcq's speech contained statements hostile to the plaintiff's contentions. Lord Goddard (at p. 619) distinguished it on the ground that the House of Lords was "concerned only with the question whether the owner of land abutting on the highway is under a duty to users of the highway to prevent his animals straying thereon unless he knows them to be dangerous . . . cattle trespass was not before the House."

The liability for damages for cattle trespass is therefore dependent upon three factors: first, unlawful entry of the cattle; secondly, the fact that the plaintiff was occupier of the land on which the trespass was committed; and thirdly, that the damages were not too remote. In consequence of these principles, damages are recoverable for injury to persons, chattels or land without proof of *scienter*.

In view of the decision in *Wormald* v. *Cole*, *supra*, it would appear that the Committee's somewhat conservative view of the present state of the law of cattle trespass requires revision. Its recommendation that the liability should be limited to damage done to the land and the crops took no account of damage done to neighbouring herds from infection spread by trespassing cattle (which evoked the reservation of Professor Goodhart) or of the possible scale of personal injuries (in *Wormald* v. *Cole* damages were assessed at £2,200). A precedent for having second thoughts on law reform is to be found in the First Report of the Law Revision Committee on the Statute of Frauds and s. 4 of the Sale of Goods Act (Cmd. 8809), which departed from some of the recommendations of the earlier committee (Cmd. 5449); such a precedent might well be followed again.

R. M. H.

A Conveyancer's Diary

MODIFICATION OF TRUSTS—I

THE decision of the House of Lords in *Chapman* v. *Chapman*, p. 246, *ante*, although in form an appeal from the decision of the Court of Appeal in the case of that name only, in fact deeply affects the decisions of the latter court in two other cases with which the *Chapman* case was closely linked at an earlier stage in its history. Consequently some knowledge of the facts of all these cases is necessary to an understanding of the decision in any one of them, the facts for this purpose including the heads of the argument in support of each application and the particular jurisdiction to which each such head was addressed. But before summarising the salient facts it will be convenient to refer the reader to the reports of these cases in some of the more commonly used series of reports.

The appeals in all these cases were heard together in the Court of Appeal, and one decision was given which covered all the cases. This decision was reported *sub nomine Re Downshire Settled Estates, Re Chapman's Settled Estates*, and *Re Blackwell's Settlement Trusts*, at [1953] Ch. 218; 1 All E.R. 103; 2 W.L.R. 94. A shorter note of this decision will also be found at 97 SOL. J. 29. Of these three cases, the *Chapman* case was heard at first instance in chambers by Harman, J., and no formal judgment was then given. There is, therefore, no report of this case at first instance. The *Downshire* and *Blackwell* cases were also heard at first instance in chambers, but judgment in each of these cases was given in open court. These cases are reported at first instance as follows: the *Downshire* case, *sub nomine Re D's Settled Estates*, at [1952] 2 T.L.R. 483 and 2 All E.R. 603, and the *Blackwell* case, *sub nomine Re B's Settlement Trusts*, at [1952] 2 T.L.R. 489 and 2 All E.R. 647. In the House of Lords the *Chapman* case was formally designated, in accordance with the practice of the House, as *Chapman* v. *Chapman*, and in addition to the summarised report which has appeared in this journal, to

which I have already referred, there is a full report of this decision in, amongst other reports, the *Weekly Law Reports* ([1954] 2 W.L.R. 723).

In the *Downshire* case certain properties consisting of lands in the United Kingdom and Eire and of invested capital moneys stood settled upon protective trusts for *D* for life, and after his death in trust for the first and other sons in tail male of *D*, with remainder to *D's* brother for life, with remainder to the first and other sons in tail male of *D's* brother, with various remainders over. The settlement by which these properties were settled contained powers for *D* and any other tenant for life to charge these properties with rent-charges for widows and portions for younger children. These powers of charging could be released, and it was part of the proposed scheme that they should be released so far as necessary. No difficulty arose, therefore, in regard to these powers, and they may be disregarded for the present purpose. *D* had no issue. *D's* brother had one son, who had attained his majority and had disentailed the entirety of the settled property. In this state of affairs, therefore, subject to the protected life interest of *D* therein, and subject to the possibility of his having issue, the settled property would devolve upon *D's* brother for life, with remainder to the latter's son absolutely.

To mitigate the incidence of estate duty on the settled property on the deaths of *D* and of *D's* brother, it was proposed that *D* and his brother should release their respective life interests in the bulk of the capital moneys in favour of the remainderman. The existence of the protective trusts upon which *D's* life interest in the settled properties was held made it impossible for *D* to make an effective release without the assistance of the court, and the scheme therefore provided that this release should not be treated as involving a forfeiture of his life interest by *D*. Further, to provide for the contingency of *D* having children (who, if they came into existence, would be potential beneficiaries under the discretionary trust which would arise on a forfeiture of his interest by *D*), it was proposed to take out a single-premium policy for a sum equivalent to the part of the capital moneys being dealt with which, it was calculated, would remain after payment of estate duty thereon on *D's* death on the footing that nothing was done and there was a passing thereof on his death, this sum to be held for the benefit of the issue of *D*. Finally, it was provided by the scheme that *D* and his brother should be compensated for their respective releases of their interests in the capital moneys dealt with by the scheme by an absolute payment to each of them of a portion of those moneys.

Application was then made to the court for an order sanctioning this scheme and authorising the trustees to carry it into execution (*a*) under the inherent jurisdiction of the Chancery Division in relation to trusts, and (*b*) under s. 64 of the Settled Land Act, 1925. Roxburgh, J., took the view that he had no jurisdiction to sanction the scheme, whatever its merits, either under (*a*) or under (*b*). The Court of Appeal (Sir Raymond Evershed, M.R., Romer and Denning, L.JJ.) unanimously reversed this decision, holding that there was jurisdiction to sanction the scheme (*a*) under the court's power to sanction, on behalf of infants and unascertained classes of persons (in this case, the issue of *D* if any should come into existence), compromises " in the broad sense," and (*b*) under s. 64. There was no appeal in this case to the House of Lords (although, as will be seen, comment was there made on this decision of the Court of Appeal).

In the *Chapman* case there were three settlements, but one may be taken as typical of all. Under this settlement certain land (to which certain personalty was added by a subsequent settlement) was held upon trust for the children of the settlors' son, who should attain the age of twenty-one years, provided that (i) until the youngest of such children should attain the age of twenty-five years, or (ii) until the expiration of twenty-one years from the death of the survivor of the settlors, if the youngest surviving child of the settlors' son should not then have attained the age of twenty-five years, the trustees were to retain the trust premises on certain trusts of a discretionary character for the benefit of the children of the settlors' son. If proviso (ii) took effect, as appeared likely, estate duty would become payable on the settled property on the death of the survivor of the settlors. To obviate this a scheme was prepared with the object of freeing the settled funds from the discretionary trusts mentioned under proviso (ii), above. Under this scheme the trustees were with the sanction of the court, to advance the settled funds to the trustees of a new settlement, which was to contain similar provisions omitting only the discretionary provisions of the existing settlement. The trustees of the existing settlement applied to the court asking simply for an order that they might be authorised to do all things necessary to give effect to the scheme already prepared, and that the scheme should thereafter be binding on all persons. The sanction of the court was necessary because the beneficiaries were either infants or unascertained persons: at the time of the application the settlors' son had three children, all infants, and more might, of course, be born to him.

Harman, J., dismissed this application on the grounds that he had no jurisdiction to sanction it either under the inherent jurisdiction of the court or under s. 57 of the Trustee Act, 1925. (It is not stated in so many words in the reports, but the land subject to the settlement must have been held on trust for sale, since s. 57 is only applicable to settlements of personalty.) The Court of Appeal upheld this decision. As regards s. 57, they held that, unlike s. 64 of the Settled Land Act, it only empowered the court to make orders with reference to the management or administration of the trust premises, and the scheme proposed concerned not an administrative difficulty but a proposal to rearrange the beneficial interests of persons entitled to the trust premises. As regards the court's inherent jurisdiction, they held by a majority (Sir Raymond Evershed, M.R., and Romer, L.J., Denning, L.J., dissenting) that the proposed scheme did not involve a compromise, even in the broad sense, such as had been held to exist in the *Downshire* case.

From this decision the trustees and the beneficiaries appealed. The point on s. 57 was abandoned, and the appeal concerned solely the court's inherent jurisdiction. As is now well known, the House of Lords dismissed the appeal, holding that, on the authorities, no jurisdiction to sanction the particular scheme existed, and indicating quite clearly that, if the *Downshire* and *Blackwell* cases had been before the House, they would have been treated in the same way as the *Chapman* case.

The facts in the *Blackwell* case can be dealt with much more shortly. This was the case of a settlement containing a protective trust, and it was this trust which the proposed scheme was intended to eliminate. To that extent the case was similar to the *Downshire* case. But it was a personalty settlement, so that in so far as a statutory jurisdiction was relied on as enabling the court to sanction the scheme, it was s. 57 of the Trustee Act and not s. 64 of the Settled Land Act. To that extent the case was similar to the *Chapman* case. As regards s. 57, the Court of Appeal treated the case in the same way as the *Chapman* case had been treated by

that court, and agreed with the decision of Roxburgh, J., below in holding that the jurisdiction under s. 57 did not extend to the sanctioning of schemes of the kind proposed. As regards the inherent jurisdiction of the court, the Court of Appeal reversed the decision of Roxburgh, J., below and held that, on the facts, the scheme proposed could be sanctioned as a compromise in the broad sense.

In each of these cases two jurisdictions were invoked, a statutory and a non-statutory jurisdiction. As will be seen, despite the decision of the House of Lords in the *Chapman* case, there are some loopholes left through which an invocation of either one or the other of these jurisdictions can be made in cases of the kind in question, if the facts warrant it. But these loopholes are neither numerous nor very wide.

"A B C"

Landlord and Tenant Notebook

THE STATUTORY SUB-TENANT

EARLY in his judgment in *Roe* v. *Russell* [1928] 2 K.B. 117 (C.A.), Scrutton, L.J., illustrated, in a numbered list of posers, the failure of the Legislature to deal adequately with the status of sub-tenants of controlled premises; at the end of that judgment the learned lord justice expressed regret at not having power to order the Parliamentary draftsmen to pay costs. The case itself decided that the sub-tenant of part of a controlled house, whose immediate landlord had been given notice to quit and had then been successfully sued for possession on the ground of rent default and had given up possession of the retained part to the superior landlord, was protected; that the Increase of Rent, etc., Restrictions Act, 1920, s. 15 (3)—"where the interest of a tenant of a dwelling-house to which this Act applies determines, either as the result of a judgment for possession . . . or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms," etc.—applied to the situation. (Later, in *Oak Property Co., Ltd.* v. *Chapman* [1947] K.B. 886 (C.A.), it was pointed out (p. 896) that *Roe* v. *Russell* did not decide what would be the result, on a sub-tenant's position, of an abandonment of the premises by the mesne tenant.)

The latest contribution to our sum of knowledge affecting sub-tenants holding of statutory mesne tenancies is *Solomon* v. *Orwell* [1954] 1 W.L.R. 629 (C.A.); *ante*, p. 248. The facts were that the plaintiff had let a house to one Mrs. *H*, that the tenancy had come to an end, that Mrs. *H* remained in possession as a statutory tenant and subsequently sub-let three rooms with a right to share her kitchen and scullery to the defendant, also agreeing to supply some services. Mrs. *H* then "gave up her statutory right of occupation" to the plaintiff, who, without giving any notice to quit, sued the sub-tenant for possession.

No fewer than eleven authorities (including one in which Coke upon Littleton was cited) were referred to in the course of argument, but only some four of these (including that one) were mentioned in the judgments; and while Evershed, M.R., considered that the point was not free from difficulty, the judgments delivered by him and Denning and Romer, L.JJ., can be said to dispose of any such difficulty in cogent terms.

It has, of course, been well established that a so-called "statutory tenant" has no estate or interest in the property concerned. It has also been established that a tenant sharing vital accommodation is not protected by the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939; such privileges as he has were conferred by the Landlord and Tenant (Rent Control) Act, 1949, which gave him the status of a tenant (or "lessee" as that enactment calls it) of furnished accommodation to whose contract the Furnished Houses (Rent Control) Act, 1946, applies.

This being so, the defence was driven to invoke the rule (or perhaps I should say "the exception") given in Co. Litt. 338*b* and cited with approval by Lord Ellenborough in *Doe d. Beadon* v. *Pyke* (1816), 5 M. & S. 146: "But having regard to strangers who were not parties or privies thereunto [a surrender] (lest by a voluntary surrender they may receive prejudice concerning any right or interest they had before the surrender), the estate surrendered hath, in consideration of law, a continuance."

Perhaps the most striking modern illustration of this proposition was that afforded by *Parker* v. *Jones* [1910] 2 K.B. 32: the plaintiff took a yearly tenancy of a field from a tenant who had no right to sub-let it; the mesne tenant surrendered his tenancy; the superior landlord, who knew nothing about the sub-letting, let the field to the defendant—against whom the plaintiff successfully asserted his rights.

But, in order to bring himself within the scope of the proposition in question, the defendant in *Solomon* v. *Orwell* had to establish that his landlord the mesne tenant had an "interest capable of existing in law as an estate" out of which his, the sub-tenant's, interest was carved or created. And this, it was held, he could not do. The court appears to have accepted without criticism the description of the termination of the mesne "tenancy" as a "surrender"; I would suggest that this is arguable, no agreement being necessary: all that is required is that the statutory tenant should cease to live in the dwelling-house, so that "abandonment taking the tenancy out of the Increase of Rent, etc., Restrictions Acts" would appear to be more apt. However, if this be a quibble, one has only to look at the commencement of Coke's above cited note to appreciate the insuperability of the defendant's initial difficulty: "'Surrender,' *sursum redditio*, properly is a yielding up of an estate for life or yeares to him that hath an immediate estate in reversion or remainder, wherein the estate for life or yeares may drowne by mutuall agreement between them." If there was any agreement between the defendant's landlord and the plaintiff, what was drowned was not an estate for life or yeares, and artificial respiration could not avail the sub-tenant. In this connection it may be mentioned that the argument advanced for the defendant drew a distinction between forfeiture and surrender at common law, it being admitted that forfeiture of a head tenancy destroys all derivative interests though relief has been made available by statute. The statutory relief in question may be likened to artificial respiration of the drowned; but a closer parallel is to be found in the Common Law Procedure Act, 1852, s. 212, of which, while the intention and effect were substantially to limit the right of Equity to relieve tenants against forfeiture for non-payment of rent, concludes with the words, "he and they shall have, hold and enjoy the demised lands, according to the lease thereof made, without any new lease." Before then, the filing of a bill in Chancery would eventually lead to an order to make a new grant.

The position of a statutory tenant's tenant who cannot invoke the protection afforded by s. 15 (3) of the 1920 Act is, therefore, analagous to that of a sub-tenant at common law whose landlord's interest determines otherwise than by surrender. There was some discussion, in the course of *Solomon* v. *Orwell*, about when the mesne tenancy held by Mrs. *H* had become a statutory one, before or after the sub-letting to the defendant; but the court, Denning, L.J., in particular, clearly indicated that it would not make any difference. Any contractual sub-tenancy came to an end when the contractual mesne tenancy came to an end. It would follow from this that a "sharing" sub-tenant might undergo a loss of security as the result of some event which he might not have expected and of which he might not be aware.

R. B.

HERE AND THERE

"BEST IN THE WORLD"

CONSIDERING how little the average fairly well informed Englishman really knows about his country's legal system or about the structure of its legal profession, the depth and tenacity of the general conviction that "British justice is the best in the world" is rather touching. But every now and then a particularly striking continental exhibition piece like the Besnard trial at Bordeaux provides a pointer to suggest why the British (and even one or two foreigners) feel that way. I think it must be the dignified expeditious knack the British lawyers have of tying up their criminal proceedings into nice neat tidy parcels ready for immediate dispatch. They begin at the beginning; they reach the middle and they get to the end, and at the end you know whether it's "guilty" or else "not guilty" or else (in Scotland) "not proven." Even if the jury disagree, the only inconvenience is going through the same motions again. Even if an appeal goes up to the House of Lords, it's a fairly short trip and there's an end of the matter when it gets there. Even awkward miscarriages of justice like Oscar Slater's or Adolf Beck's don't really distort the pleasing symmetry of British criminal procedure: the awkwardness is dealt with discreetly in other channels and, so far as the courts are concerned, honour is saved. But in other countries there seems to be no particular reason why a criminal trial should ever finish. In the United States, thanks to the intricate convolutions of the appellate system, anyone condemned to death can rest assured that, provided his legal advisers are active and ingenious enough, he has at least a reasonably good chance of dying of old age before the procedural resources at his disposal are exhausted.

ON AND ON

BUT, by any standards, the trial of Marie Besnard at the Bordeaux Assizes must be a procedural curiosity. First of all there was the indictment which included no less than twelve charges of murder by poisoning, reading rather like a list of the prohibited degrees of kindred. The lady was alleged to have disposed of her first husband, her second husband, her great aunt, her father-in-law, her mother-in-law, her sister-in-law, her father, her mother, two old cousins and a couple of neighbours at a net profit in inheritances of our equivalent of £20,000. In England that national genius for moderation and understatement saves murder from any suspicion of exhibitionist exaggeration. But it is otherwise on the Continent. Either foreign realism tells any enterprising murderer that, since he can only be executed once, he needn't economise in victims, or else the zeal of foreign criminal investigators suggests that the more charges they can accumulate the surer they are of at least one conviction. Whatever the reason, multiple murder trials are no rarity abroad. But the course of the Besnard case has given it a *cachet* all its own. The trail starts in 1947 in the village of Loudun with the death of Léon Besnard, a farmer. Ugly rumours of arsenic poisoning get about, but after a few preliminary inquiries the police take no action. For two years the rumours buzz louder, suggesting a veritable massacre by arsenic. Eventually the police move again and exhume a dozen bodies. The expert who examines them reports that he finds arsenic in them all and in February, 1952, the widow stands her trial at the Poitiers Assizes. The defence succeeds in tearing the analyst's evidence wide open and in England, I suppose, for better or for worse, that would have been the end of the matter. Not so at Poitiers. The accused was remanded back to prison and two more experts took over the corpse, very much the worse for wear by reason of time, decay, subterranean water and the experiments of the first expert. One of them was to apply the most up-to-date tests for detecting arsenic in hairs; the other was to resort to less esoteric methods. Eventually, two years after the first trial, the case came on again, this time at the Bordeaux Assizes. The hearing was, of course, marked by the lively insubordination in which witnesses in French criminal courts seem to specialise. There was a good deal of fun and laughter (with the accused joining in) during the cross-examination of village gossips and of police officers who were alleged to have planted "stool pigeons" in the widow's cell to extract confidences. But the real battle was the battle of the experts. One said that the decomposed remains were so intermingled with extraneous matter, earth, powdered wood and remnants of linen and flowers, that no certain conclusion was possible. The other, who had examined the hair, said that it undoubtedly indicated the presence of arsenic absorbed during life. Two more experts added their learning to the prevailing confusion and the final upshot was that, on the motion of the defence, the case was adjourned again for a commission of super experts to report on the whole evidence, while the accused was released on bail. There the matter rests.

A POINT OR TWO

THE trial, of course, provided a regular Godsend for the French newspapers and the reporters had a rich field to harvest. One can only hint at the riches. There was, for example, the description of the accused by a psychiatrist called to give evidence as "abnormally normal," alike in her descent from sturdy, healthy peasants and in her own make-up. It was interesting to deduce from his further analysis in what "abnormal normality" consists. Physically, Marie was "a rock of health," never having had an illness since whooping cough in childhood. In character she was reasonable, with an average intelligence, an excellent memory and an extreme capacity for attention. She had little or no imagination and no artistic sense of any description, being equally insensible to music, art and poetry. She was passionately attached to the realities of life, money, profit, interest. She was as unemotional as it was possible to be. Her will was tenacious; she knew what she wanted and did everything to get it. She was as completely responsible for

her actions as it was possible to be. This portrait of the "normal woman" has general interest. A reporter's impression of counsel for the defence may be of professional interest. In the first place, he thought, there were too many of them. "Talents do not add up to a total, as people believe, but oppose one another." (French practice apparently allowed all the counsel to intervene as they pleased.) "They are dissatisfied with their colleagues' interventions. They feel aggrieved if they do not all have their say, one after the other, on every question. They tear arguments out of one another's mouths. They confront one another." Senior counsel for the defence (since in the context of those particular conventions of procedure one can hardly call him "leading counsel") even once mistook one of the junior juniors on his own side for one of the enemy. One of the reporters drew a portrait of him: "He is always the combative man that we know so well. If one dared to make a criticism of him it would bear on a certain oratorical slowness of reflex. The art of cross-examination is related to fencing. He fights with the sword rather than the rapier and sometimes with the boarding cutlass. Ring-side critics would say that he 'telephones' his blows, meaning that he announces them and thereby warns his opponent. He has a most praiseworthy regard for form, and practices to a rare degree the difficult exercise of the concordance of the tenses of his verbs, but I know colleagues of his who with the language of market porters would score a bull's-eye where he elegantly misses the target. Sometimes one may prefer sharp wines to the great vintages, but when the skirmishes are over then comes the time for the speeches and the golden wine will have its revenge." There's something in that description even for English advocates.

RICHARD ROE.

NOTES OF CASES

The Notes of Cases in this issue are published by arrangement with the Incorporated Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible the appropriate page reference is given at the end of the note.

HOUSE OF LORDS

CUSTODIAN OF ENEMY PROPERTY: WHETHER SERVANT OR AGENT OF CROWN

Bank voor Handel en Scheepvaart N.V. *v.* Administrator of Hungarian Property

Lord Morton of Henryton, Lord Reid, Lord Tucker, Lord Asquith of Bishopstone and Lord Keith of Avonholm

1st April, 1954

Appeal from the Court of Appeal ([1953] 1 Q.B. 248; 96 SOL. J. 784).

The plaintiff bank, a Dutch corporation, was in 1939 wholly owned by a Hungarian national. In July, 1940, a quantity of gold held by the bank in London was transferred to the Custodian of Enemy Property, who sold it. In April, 1950, the proceeds of the sale, less the Custodian's fee, was transferred to the Administrator of Hungarian Property. The bank brought an action against the Custodian and the Administrator, claiming the proceeds of sale. Devlin, J., gave judgment for the Custodian, but held that the bank was entitled to recover from the Administrator the amount recovered from the Custodian, together with interest or other profits earned (see [1951] 2 T.L.R. 755; 95 SOL. J. 546). The case came on for further consideration on a claim by the bank for a further sum of £76,000, representing income tax paid by the Custodian on profits made by him. It was claimed by the bank that the Custodian, as a servant of the Crown, was not liable to such tax and should not have paid it. Devlin, J., held that the Custodian was an official whose duties brought him within the sphere of two ancient Crown prerogatives, of making war and taking enemy property (see *Austrian Property Administrator* v. *Russian Bank for Foreign Trade* (1932), 48 T.L.R. 37), so that he was not liable in respect of income tax and should not have paid it, with the result that the bank's claim succeeded. The Court of Appeal having allowed an appeal by the Administrator, the bank appealed to the House of Lords.

LORD MORTON OF HENRYTON, delivering a dissenting opinion, said that the only question was whether or not the Custodian was liable to pay income tax on the sum in question. It was admitted on behalf of the bank that the produce or "fruits" of the investments made by the Custodian were "annual profits or gains" within the ambit of the charge created by Sched. D to the Income Tax Act, 1918. It was submitted on behalf of the Crown that the burden lay on the bank to establish that during the years in question the Custodian was entitled to claim immunity. The Custodian was appointed under s. 7 (1) of the Trading with the Enemy Act, 1939. Much of the argument centred around the question whether the Custodian was "strictly a servant of the Crown" or could be "considered *in consimili casu*." Having regard to the reasons for his appointment, the nature of his duties and the control exercised over him by the Board of Trade, he was a servant of the Crown, but even on this footing the bank must fail. The bank's beneficial interest in the property was suspended, and in September, 1945, the Custodian could not tell whether the beneficial interest in the capital or income or both would ultimately be restored to the bank or transferred to other persons. Either of these events might result from a direction of the Board of Trade under para. 3 of the Trading with the Enemy (Custodian) Order, 1939, or from a direction of the Treasury under para. 4 (3) of the Defence (Trading with the Enemy) Regulations, 1940, or from "arrangements to be made on the conclusion of peace" (see s. 7 of the Trading with the Enemy Act, 1939). Even if the income in question might have been paid into the Treasury at a later date the Custodian could not show that it was Crown income in September, 1945. The income came within the taxing provisions of income tax legislation. The Custodian was the "person receiving the income." There were no grounds on which he could have discharged the burden of proving Crown immunity. The question should be answered in favour of the respondent and the appeal should be dismissed.

LORD REID said that the Custodian was liable to pay income tax on the income received by him unless he was entitled to rely on the royal prerogative and plead Crown immunity as an answer to the assessments made on him. That the Income Tax Acts did not bind the Crown was true at least to this extent: tax was not payable in respect of income received by the Sovereign, nor was it payable in respect of Crown income received on behalf of the Crown by a servant of the Crown in the course of his official duties. It might be hard to determine whether a servant of the Crown could plead immunity from tax in respect of all income which it happened to be part of his duty to receive, or whether it was also necessary that the income should in some sense be Crown income or applicable for Crown purposes. The starting point of any discussion of those questions must be *Mersey Docks and Harbour Board* v. *Cameron* (1865), 11 H.L. Cas. 443; *Greig* v. *Edinburgh University* (1868), L.R. 1 H.L. Sc. 348 and *Coomber* v. *Berkshire Justices* (1883), 9 App. Cas. 61. Though these decisions did not govern this case, speeches in all of them contained statements of principle which might be of decisive importance. There was nothing in these cases which required the House to limit the class of servants of the Crown to Ministers and the like or to exclude subordinate servants of the Crown. His lordship was unwilling to hold that there was any essential difference between superior and subordinate servants of the Crown. The House was free to hold that there was no essential distinction. Ministers were servants of the Crown. With regard to others, the Crown, through or with the advice of a Minister, controlled them and directed their activities in a way which made the term "servant" quite appropriate. The question whether the Custodian was a servant of the Crown depended on the degree of control which the Crown through its Ministers could exercise over him in the performance of his duties. It might be that in practice he was given fairly wide discretion but, in view of the need during the war for widespread Government control, it would be surprising if he had in any immediate degree been exempted from direct and immediate control, and in fact he was not. No such independent powers and discretions as

were referred to in *Metropolitan Meat Industry Board* v. *Sheedy* [1927] A.C. 899 were committed to him. He was a servant of the Crown and received this income in the course of his official duties. His lordship was prepared to assume that if a case arose in which it was the duty of a Crown servant merely to hold property with accruing income for a period and then pay it to some as yet unascertained private person, tax would be payable on the income accruing. That would be because in such a case payment of tax could not possibly prejudice any Crown interest or purpose. While it might be that a Crown servant could not claim Crown immunity in respect of his performance of statutory duties which served no Crown purpose, nothing justified the argument that Crown immunity could only be claimed by the Crown or its servants on its behalf if it was required to protect some direct or financial interest of the Crown; still less was there support for the argument that immunity could not be claimed by the Crown unless the Crown alone was interested in the benefit which it would bring. There was every reason for limiting the right of independent bodies performing functions of a governmental character to claim immunity, but there was no ground for applying those limits to the Crown itself. If an Act of Parliament did not bind the Crown, the Crown could claim immunity from its provisions whether its interest to obtain immunity in a particular case was large or small, direct or indirect (*Austrian Property Administrator* v. *Russian Bank for Foreign Trade* (1932), 48 T.L.R. 37.) There was no difference in principle between Crown immunity from the provisions of the Statute of Limitations and those of the Income Tax Acts. In either case a Crown servant fulfilling a Crown purpose could claim immunity, whether or not the resulting financial benefit was to go to the Crown. As to the legal position of property vested in the Custodian and the rights of the Crown with regard to it, the Crown had no beneficial right to property while it was in the hands of the Custodian, and if one were not to look further than that, it might well be that the Crown (or the Custodian on its behalf) could not claim that income accruing to the Custodian was immune from tax, but one must look further. The nature of the Crown's interest in, or right to deal with, the income must depend, in the first place at least, on the true construction of the Trading with the Enemy Act, 1939, and, in particular, s. 7. The construction of s. 7 was involved in *R. J. Reuter Co., Ltd.* v. *Mulhens* [1954] 1 Ch. 50. If the view there taken by the Court of Appeal was wrong the power of the Board of Trade was more restricted than if the court was right. Even supposing that the court was wrong, there was still sufficient interest in the Crown to support Crown immunity. If the Custodian had been directed to assert Crown immunity in this case and had done so, he would not have had to pay the income tax in question. The appeal should be allowed.

LORD TUCKER and LORD ASQUITH OF BISHOPSTONE agreed that the appeal should be allowed.

LORD KEITH OF AVONHOLM considered that it should be dismissed. Appeal allowed.

APPEARANCES: *Charles Russell*, Q.C., and *Mark Littman* (*Hardman, Phillips & Mann*); *Sir Lionel Heald*, Q.C., A.-G., *J. H. Stamp*, *J. P. Ashworth* and *R. J. Parker* (*Solicitor to the Board of Trade*).

[Reported by F. H. COWPER, Esq., Barrister-at-Law] **[2 W.L.R. 867**

COURT OF APPEAL

FACTORY: STATUTORY DUTY: NEGLIGENCE: ENTRANCE RENDERED UNSAFE BY SNOWSTORM

Thomas *v.* Bristol Aeroplane Co., Ltd.

Somervell, Morris and Romer, L.JJ. 30th March, 1954

Appeal from Lynskey, J.

By s. 26 of the Factories Act, 1937: "there shall, so far as reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work." The plaintiff, a man in the employ of the defendants, arrived at the entrance to their factory at about 7 o'clock on a Monday morning. Shortly before there had been a sudden fall of snow which froze as it fell, and rendered the ramp leading down to the entrance, and a space at the bottom of the ramp, slippery. The plaintiff, in entering the factory, slipped on a piece of ice, fell, and sustained injury. The defendants maintained a squad of men, part of whose duty it was to scatter sand if the weather made it necessary, but the factory being closed during the week-end there was no maintenance man on duty till very shortly after the accident. The plaintiff claimed damages for negligence at common law and breach of statutory duty. Lynskey, J., dismissed the action. The plaintiff appealed.

SOMERVELL, L.J., said that the danger of finding surfaces icy was one of the incidents of winter which everyone encountered, and must anticipate and take care of. It was right and proper that the defendants should have a system for sanding icy surfaces, but to suggest that there was negligence or a breach of s. 26 because they did not have a squad standing by to apply sand whenever any surface became slippery was to impose a higher standard than that required by s. 26 or at common law.

MORRIS, L.J., agreeing, said that the defendants had not been remiss. The men coming to work at seven on a Monday morning would know that there had been no night shift on Sunday night, and would also know the slippery conditions which prevailed. It would place an intolerable burden on employers if it was said that they ought to have provided a system whereby no part of the approach to the workplaces would be icy, and even the most perfect system would involve some interval of time between the moment when difficult conditions began and when measures to cope with them could be put into operation.

ROMER, L.J., agreed. Appeal dismissed.

APPEARANCES: *F. W. Beney*, Q.C., and *Herrick Collins* (*Pattinson & Brewer*, for *Lawrence, Williams & Co.*, Bristol); *R. M. Everett*, Q.C., and *K. H. Bain* (*Peacock & Goddard*, for *Cartwright, Taylor & Corpe*, Bristol).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[1 W.L.R. 694**

CHANCERY DIVISION

TRUST: PURCHASE OF TRUST PROPERTY BY TRUSTEE: DEVOLUTION OF PURCHASE PRICE PAYABLE BY BENEFICIARIES ON SETTING TRANSACTION ASIDE

***In re* Sherman, deceased**

***In re* Walters, deceased**

Trevenen and Another *v.* Pearce and Others

Harman, J. 16th March, 1954

Adjourned summons.

A testatrix by her will specifically devised the freehold house in which she lived and of which she believed herself to be absolute owner. Some years previously she had purported, by transactions which included a conveyance to a nominee and a trust deed supplemental thereto executed by him in her favour, to buy it from herself as sole executrix of the estate of the owner. On her death her executors, who were also executors by representation of the owner, did not oppose a claim by the beneficiaries under the owner's will to set aside the conveyance to the nominee. Those beneficiaries, however, could regain possession of the property only by paying the money which the testatrix had paid for it with interest from the date on which she paid it: and her executors took out a summons to determine the devolution of that money and interest.

HARMAN, J., said that it was first suggested that the case was similar to one of ademption, where a man, having bought property, subsequently contracted to sell it, and then, though the purchase was uncompleted till after his death, the contract passed as a specific devise. But it appeared that cases concerning options were more in point. The general doctrine, known as the rule in *Lawes* v. *Bennett* (1785), 1 Cox 167, was stated in Theobald on Wills, 11th ed., at p. 244; where land included in a general devise was subject to a lease with a power to the lessee to buy the land, and the option was exercised after the testator's death, the land was converted as from the date of the exercise of the option, and the proceeds of sale fell into general residue. That might well affect a general devise, but the devise here was specific. At her death the testatrix had a good equitable interest in the property which would pass to her devisee provided that the beneficiaries did not set the transaction aside; that was "clearly devisable" as in *Stump* v. *Gaby* (1852), 2 De G. M. & G. 623. When she devised the property, she meant to pass whatever interest she had to the specific devisee. He, accordingly, was entitled to the compensation money payable by the beneficiaries on setting the transaction aside, together with interest after her death, but subject to any occupation rent payable for the same period; interest and occupation rent arising before her death were attributable to her personal estate. Declaration accordingly.

APPEARANCES: *M. J. Albery*; *M. Berkeley*; *A. C. Sparrow* (*Robbins, Olivey & Lake*, for *Grylls & Paige*, Redruth).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[2 W.L.R. 903**

PROBATE, DIVORCE AND ADMIRALTY DIVISION

HUSBAND AND WIFE: JUSTICES: ANTE-DATING PAYMENTS AFTER SUCCESSFUL APPEAL: EFFECT OF COMMITTAL ORDER

Starkey *v.* Starkey

Lord Merriman, P., and Sachs, J.
10th March, 1954

Appeal from Kineton justices.

On 11th April, 1952, the justices dismissed complaints by the wife that the husband had been guilty of desertion and a wilful neglect to provide reasonable maintenance on 6th March, 1952, and dates prior thereto. On 11th February, 1953, the Divisional Court allowed the wife's appeal, reversing the dismissal of the complaints in so far as they related to neglect to maintain, and sent the case back to a fresh panel of the justices to assess the amount of maintenance to be paid to the wife. The husband appealed to the Court of Appeal, but his appeal was dismissed. On 18th August, 1953, the matter again came before the justices, who made an order for £5 a week, but refused to date the order back, either to April, 1952, or February, 1953. The wife wished to appeal against the order in so far as it related to the date of the initial payment, but there was a delay arising in part from an error in procedure, and notice of appeal was not filed until 2nd December, 1953. Leave was given for the appeal to be heard out of time. The husband, who appeared to be a man of some substance, refused to make any payments under the order, and on 14th January, 1954, an application was filed for the committal of the husband. On 24th February, 1954, following an adjournment, the justices made a committal order in respect of £135 arrears. The order was suspended until 2nd March, 1954, to give the husband an opportunity to reconsider his position; but he made no payment and on 2nd March, 1954, he was sent to prison.

LORD MERRIMAN, P., said that the Divisional Court had power, as the justices would have had power, to make the order operate from April, 1952, or February, 1953—the date of the original dismissal of the summons and of the successful appeal to the Divisional Court. But the husband had been committed in respect of the arrears of maintenance which he had failed to pay. It was clear from Pearson, J.'s, judgment in *R.* v. *Miskin Lower, Glamorganshire Justices; ex parte Young* [1953] 1 Q.B. 533, 539; 97 SOL. J. 136, that the imprisonment discharged the husband from liability for the arrears for which he had been imprisoned. His lordship referred to ss. 64, 74, 75 and 76 of the Magistrates' Courts Act, 1952, and pointed out that the justices had made no special order under s. 75 of the Act that arrears should accrue under the order while the husband was in prison. The position therefore was that by serving the term of imprisonment the husband would be acquitted of the arrears and that there would be no fresh accumulation of arrears till his release. Although the maintenance might have been ordered from a date prior to that of the re-hearing before the justices, it would be wrong to allow the appeal in the circumstances as the justices had already committed the husband for the arrears which had accumulated since the date of the order under appeal.

SACHS, J., concurring, referred to *Jinks* v. *Jinks* [1936] 3 All E.R. 1051, and pointed out the difference which existed between proceedings for commitment in the High Court and in a court of summary jurisdiction. Appeal dismissed.

APPEARANCES: *Douglas Draycott* (*Wm. Easton & Sons*, for *Geoffrey Parker & Peacock*, Stratford-upon-Avon). The husband did not appear and was not represented.

[Reported by JOHN B. GARDNER, Esq., Barrister-at-Law] **[2 W.L.R. 907**

SURVEY OF THE WEEK

HOUSE OF LORDS

PROGRESS OF BILLS

Read First Time :—

Metropolitan Common Scheme (Ham) Provisional Order Bill [H.C.] [15th April.
Telegraph Bill [H.C.] [15th April.

Read Second Time :—

Protection of Birds Bill [H.C.] [15th April.

HOUSE OF COMMONS

A. PROGRESS OF BILLS

Read Third Time :—

Birkenhead Corporation Bill [H.C.] [15th April.

B. QUESTIONS

INDECENT ASSAULTS

Asked whether the Home Secretary had observed the remarks of the Lord Chief Justice in the recent case of *R.* v. *King* pointing out that the maximum penalty which could be imposed on a man who, having five previous convictions for indecent assault, then committed a further offence upon a girl aged two, was two years imprisonment, Sir HUGH LUCAS-TOOTH said the Home Secretary had no reason to think that the maximum penalty of two years was generally inadequate. When the accused was convicted on more than one charge consecutive sentences could be imposed. [15th April.

VISITING FORCES (CLAIMS PROCEDURE)

Mr. NIGEL BIRCH stated that when the Government had ratified the N.A.T.O. Status of Forces Agreement, 1951 (Cmd. 8279), a statement would be issued showing the nature and operation of the arrangements which had been made for the settlement of claims against visiting forces, most of which arose from accidents involving service vehicles of such forces.

The following is a draft of the proposed statement, the date to be inserted in para. 3 being the date when the Status of Forces Agreement, 1951, enters into force in the United Kingdom :—

VISITING FORCES ACT, 1952

Statement to be issued by the Minister of Defence in pursuance of s. 9 (2) of the Act

The nature and operation of the arrangements made by the Minister of Defence under s. 9 of the Visiting Forces Act, 1952, with regard to the settlement of claims against members of a visiting force to which the Act applies or is made to apply, are as follows :—

2. The claims to which the arrangements relate are :—

(*a*) Claims arising out of tortious acts committed on land in the United Kingdom by any member of a visiting force or its civilian component including claims arising out of accidents caused in the United Kingdom by aircraft owned or controlled by a visiting force;

(*b*) Claims (hereinafter called maritime claims) in respect of death or personal injury caused by tortious acts arising out of or in connection with the navigation or operation within the United Kingdom or the territorial waters thereof of a ship engaged for the purposes of a visiting force present in this country and owned by or at the risk of a country to which that visiting force belongs including claims in connection with the loading, carriage or discharge of the cargo from any such ship in the United Kingdom.

3. The arrangements will apply to claims arising out of acts committed on or after the day of , 1954.

4. Claimants must address their claims as follows :—

(*a*) Maritime claims should be addressed to—

The Secretary of the Admiralty, Naval Law Branch, Queen Anne's Mansions, London, S.W.1.

(*b*) Claims arising out of accidents involving aircraft owned or controlled by a visiting force should be addressed to—

The Under Secretary of State, Air Ministry F7 (d), Metropole Buildings, Northumberland Avenue, London, W.C.2.

(*c*) All other claims arising out of tortious acts of any member of a visiting force or its civilian component should be addressed to—

The Secretary, Claims Commission, War Office, Nuffield House, Piccadilly, London, W.1.

5. If the alleged tortious act complained of was committed during the performance of an official duty, the claim will be dealt with in the same manner as it would have been if such tortious act had been committed by a member of the British Armed Forces. If a settlement of the claim is reached by negotiation any sum due under that settlement will be paid. If, however, a settlement of the claim cannot be reached by negotiation it is open to the claimant to bring proceedings in the British courts in respect of his claim against the individual wrongdoer concerned and any sum due under any judgment of the court obtained by the claimant will be paid to him (provided notice of the intention to start proceedings against the wrongdoer has been given to authorities referred to in para. 4) except that in the case of maritime claims there will be paid only so much of the amount of the judgment as the Crown would be liable to pay if it were able to limit its liability under the Merchant Shipping Acts, 1894 to 1940, as applied by s. 5 of the Crown Proceedings Act, 1947.

6. If on investigation of a claim it is ascertained that the act complained of was not committed during the performance of an official duty, no responsibility for settlement will be accepted by the Minister of Defence. The claim will, however, be investigated by the appropriate United Kingdom authority and a report prepared and submitted to the appropriate authority of the visiting force concerned so that the latter may consider whether or not an *ex gratia* payment might be made to the claimant direct by the particular force concerned. A claimant, if he so desires, may institute proceedings against the individual concerned in respect of any act outside the scope of an official duty, but responsibility for satisfying a judgment obtained in these circumstances will not be accepted by the Minister of Defence.

7. If a dispute arises whether a tortious act of a member of a visiting force or civilian component was done in the performance of official duty the question may be submitted to a legal arbitrator whose decision will be binding and conclusive upon all the parties concerned. The same course will be followed where a claimant is unable to identify the wrongdoer. [15th April.

C. Debates

On the motion to approve the draft **Visiting Forces (Application of Law) Order, 1954,** Sir David Maxwell Fyfe, pointing out some of the principal matters dealt with in the Order, said it would enable British Government Departments to acquire land for visiting forces. It would also enable witnesses to be summoned to the courts of visiting forces. This would be done by an officer of the home forces. The Order also enabled a national of the visiting force to be imprisoned in a British prison whilst serving a sentence imposed by a visiting force's court, provided the authority of the Secretary of State for War or the First Lord of the Admiralty were obtained. Though the Visiting Forces Act, 1952, gave authority for the courts of visiting forces to operate in this country, nevertheless members of those forces charged with an offence against United Kingdom law would normally be tried by United Kingdom criminal courts, unless the offence arose out of or in the course of the offender's duty, or unless the offence was against the person or property of another member of the visiting force or against the property of the sending country.

Article 8 of the Order provided exemption for vehicles belonging to visiting forces, and used for their purposes, and other vehicles so used by a person subject to the order of any member of a visiting force, from the provisions of the Road Traffic Acts relating to compulsory third-party insurance. They would thus be in the same position as our own service vehicles. When a member of a visiting force was driving a car off duty he would commit a criminal offence if he did not have third-party insurance. In future, claims against U.S. servicemen on duty would be paid by the British Claims Commission, who would recover the moneys paid from the U.S. Government by agreement. Henceforward, in fact, all negotiations as to claims would be with the British Government.

Mr. Chuter Ede asked how much land was going to be taken by visiting forces; would such forces make contributions in lieu of rates to the local authorities where the land was situated; would it be made clear that the provision enabling visiting forces to carry firearms without licence only applied when they were on duty? Mr. Ede drew attention to a provision that no service court should have power to compel any person to give or produce evidence which he could not lawfully be compelled to give or produce in a criminal court in England. How was the ordinary British citizen to be protected in the exercise of this immunity?

Sir Frank Soskice suggested, and the Attorney-General agreed, that, if a visiting soldier drove carelessly on duty, he would be triable only by his own service court if he knocked down a British civilian. If, however, the foreign serviceman was off duty, he would be subject to the Road Traffic Acts and triable by our own courts. Any claim would be dealt with by the Claims Commission, but only on an *ex gratia* basis. If the driver were on duty and judgment was recovered, the sum would be paid by the British Government and reimbursed by the U.S. Government.

The Attorney-General, replying to the debate, said the needs of visiting forces as far as could be seen at present were about 3,000 acres; it was hoped that contributions to rates would be made, but, as with our own forces, such contributions would not be legally enforceable; firearms would only be permissible when on duty or going to or from target practice as with our own forces. He thought the U.S. authorities would give instructions to their courts not to seek to compel evidence not legally compellable in our own courts. Where private cars were concerned, visiting forces could be sued civilly for negligence and were liable criminally if not insured third party. Where vehicles on duty were involved the position would be as for our own forces, except that claims for damages would be settled by the Ministry of Defence under s. 9 of the Visiting Forces Act, 1952, instead of by the War Office Claims Commission. Where visiting forces used service vehicles, but not on duty, the position would be as for our own forces in like circumstances. The vehicle ceased to be exempt from the obligations to have third-party insurance and the driver would be liable civilly and criminally.

[14th April.

STATUTORY INSTRUMENTS

Bacon (Amendment) Order, 1954. (S.I. 1954 No. 471.) 6d.

Birmingham–Great Yarmouth Trunk Road (Thorpe Diversion) (Revocation) Order, 1954. (S.I. 1954 No. 467.)

Church of England Pensions Board (Powers) (Channel Islands) Order, 1954. (S.I. 1954 No. 486.)

Coal Distribution (Restriction) Direction, 1954. (S.I. 1954 No. 496.)

Double Taxation Relief (Taxes on Income) (Belgium) Order, 1954. (S.I. 1954 No. 487.) 8d.

Housing (Cost of Improvement Works) (Scotland) Amendment Regulations, 1954. (S.I. 1954 No. 492 (S.51).)

Housing (Improvement Grants) (Expenses) Regulations, 1954. (S.I. 1954 No. 478.)

Importation of Potatoes from Portugal and Spain (General Licence) Order, 1954. (S.I. 1954 No. 477.)

Kenya Protectorate (Amendment) Order in Council, 1954. (S.I. 1954 No. 483.)

Minister of Materials Raw Materials (Charges) (Revocations) Order, 1954. (S.I. 1954 No. 479.)

North of Scotland Hydro-Electric Board (Constructional Scheme No. 29) Confirmation Order, 1954. (S.I. 1954 No. 472 (S.50).)

Northern Rhodesia (Legislative Council) (Amendment No. 2) Order in Council, 1954. (S.I. 1954 No. 482.)

Northern Rhodesia Order in Council, 1954. (S.I. 1954 No. 481.)

Nurses (Scotland) Rules, 1954, Approval Instrument, 1954. (S.I. 1954 No. 493 (S.52).) 1s. 5d.

Nyasaland Protectorate (Mineral Rights) (Amendment) Order in Council, 1954. (S.I. 1954 No. 480.)

Perth–Aberdeen–Inverness Trunk Road (Crannoch Hill Diversion) Order, 1954. (S.I. 1954 No. 463.)

Petty Sessional Divisions (Berkshire) Order, 1954. (S.I. 1954 No. 497.) 6d.

Potato Marketing Scheme (Modification and Suspension) (Amendment) Order, 1954. (S.I. 1954 No. 489.)

Ships' Stores (Charges) (Amendment No. 2) Order, 1954. (S.I. 1954 No. 494.)

Shrewsbury–Whitchurch–Warrington Trunk Road (Linford Diversion) Order, 1954. (S.I. 1954 No. 476.)

Special Constables (Pensions) Order, 1954. (S.I. 1954 No. 484.) 5d.

Special Constables (Pensions) (Scotland) Order, 1954. (S.I. 1954 No. 485.) 5d.

Standards for School Premises Regulations, 1954. (S.I. 1954 No. 473.) 11d.

Stopping up of Highways (Lincolnshire—Parts of Holland) (No. 1) Order, 1954. (S.I. 1954 No. 465.)

Stopping up of Highways (London) (No. 12) Order, 1954. (S.I. 1954 No. 474.)

Stopping up of Highways (London) (No. 13) Order, 1954. (S.I. 1954 No. 466.)

Stopping up of Highways (London) (No. 14) Order, 1954. (S.I. 1954 No. 464.)

Winchester–Preston Trunk Road (Brereton Green Diversion) Order, 1954. (S.I. 1954 No. 475.)

Wireless Telegraphy (Colonial Ships and Aircraft) Order, 1954. (S.I. 1954 No. 488.)

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., 102–3 Fetter Lane, E.C.4. The price in each case, unless otherwise stated, is 4d., post free.]

POINTS IN PRACTICE

Licensing—Occasional Licence—"Public" Dinner or Ball

Q. *A* has an ordinary justices' licence in respect of premises known as *Y* and desires to be allowed to sell intoxicating liquor at *X* (unlicensed premises) on the occasion of a dance between the hours of 8 p.m. and 12 midnight. (1) Does s. 151 (1) of the Customs and Excise Act, 1952, apply to this case? We note the section refers to "retailer's on-licence" (2) If so, should the application be refused as the occasion is not a dinner or a ball? (3) If so, has "dinner" and "ball" been judicially defined and what are the authorities?

A. (1) Yes. "Retailer's on-licence" is defined in s. 149 (1) (*a*) and, if the occasional licence is granted, *A* may sell at *X* all the types of liquor which he may sell at *Y*. (2) The application may be granted up to 10 p.m. if the occasion is not a "public" dinner or ball. If it is a "public" ball, it may be granted up to midnight or later (s. 151 (1) (*a*)). (3) In *Maloney* v. *Lingard* (1898), 42 Sol. J. 193 (a case on a statute relating to licences for public dancing), it was said that it must be a question of fact if a subscription ball is public or not. It is a public ball if any person who pays for a ticket is admitted, even though the promoters reserve the right to refuse tickets to improper persons. But where persons get up a ball solely for the amusement of themselves and such of their friends as are willing to subscribe to expenses and to which the public are in no way invited, this is a private ball. See also 108 J.P. News. 323.

Debt—Director Undertaking Responsibility for Cost of Repairs to Company's Van—Company in Liquidation—Liability

Q. *A* took a van to a garage and instructed the proprietor *B* to carry out extensive repairs. The van was inscribed with the name of a limited company. *B* knew that the company was in financial difficulties and informed *A* that he would not carry out the repairs until he had a satisfactory guarantee that his bill would be paid. *A* thereupon said that he (*A*) was a director of the company and that he would be responsible for payment of the bill. *B* knew that *A* was a man of substance, and *B* thereupon carried out the repairs and allowed the van to be taken away. The company is now in liquidation and *A* has repudiated liability for the debt, which amounts to about £80. Can *B*, in your opinion, formulate a claim against *A* that might have some chance of success? We think not. It seems to us that *A* was acting as an agent for the company, in which case he disclosed the fact, or that he guaranteed payment, in which event such guarantee should have been in writing to be enforceable. The contract was fully performed, but it appears to us that the doctrine of part or whole performance to take a case out of the Statute of Frauds only applies to the parties to a contract and not to a guarantor.

A. A contract of guarantee is not specifically enforceable, so that there is no need to consider part performance. The crucial question is whether *A* did merely guarantee payment of the bill, in which case he cannot be sued on that guarantee, or whether his answer to *B's* doubts made him (*A*) a principal notwithstanding that the company's name was known to *B*. To whom did *B* in fact give the credit, in other words, to the company or to *A*? We think that if the conversation between *A* and *B* is correctly epitomised in the query there is a reasonable chance of the director being held personally liable.

Questions, which can only be accepted from practising solicitors who are subscribers either directly or through a newsagent, should be addressed to the "Points in Practice" Department, The Solicitors' Journal, 102-103 Fetter Lane, London, E.C.4.

They should be **brief, typewritten in duplicate,** and accompanied by the name and address of the sender **on a separate sheet,** together with a **stamped addressed envelope.** Responsibility cannot be accepted for the return of documents submitted, and no undertaking can be given to reply by any particular date or at all.

Income Tax, Schedule A—Apportionment between Vendor and Purchaser

Q. We have recently been referred by a vendor's solicitor to s. 106 (*c*) of the Income Tax Act, 1952, and we are wondering if in your view this changes the position, save in regard to tax arrears, as to the year of assessment in which the sale falls. In s. 106 (*a*) it is provided that the tax on each Sched. A assessment shall be levied on the "occupier for the time being." The tax is levied on 1st January each year for the period from the previous 6th April to the following 5th April. Suppose completion takes place on 1st June of any year. The purchaser will be the person who on 1st January following is the "occupier for the time being." Accordingly, do you agree that s. 106 (*c*) does not assist him to avoid responsibility for the tax between 6th April and the completion date, 1st June. It cannot be said this is tax which "ought to have been levied upon any former occupier," as under the normal provision tax "ought" to be levied only on 1st January each year.

A. We have no doubt that whatever is and was the position as between vendor and purchaser it is not changed as a result of the Income Tax Act, 1952, s. 106, which re-enacts in identical words the Income Tax Act, 1918, Sched. A rules, No. VII, r. 3, and No. VIII, r. 7. The object of s. 106 is not to impose or quantify the liabilities of the taxpayer, but is merely to simplify collection; without it tax could not be collected from one taxpayer when the assessment had been made upon another. In the normal way provision is made in the contract of sale for apportionment of the Sched. A tax up to the date of completion: e.g., Law Society's Conditions of Sale, 1953 edition, condition 5 (3). But in the absence of such a condition it seems that an apportionment by the General Commissioners could be had under the Income Tax Act, 1952, s. 509 (1) (*b*).

Landlord and Tenant—Holding over on Expiry of Lease—Measure of Damages

Q. *A* is the lessee of premises, the lease of which expires in two months' time. *A* is desirous of continuing in the premises for a period of six months whilst his new premises, which he is having built, are being completed. The Leasehold Property (Temporary Provisions) Act, 1951, does not apply in this case. Relations between *A* and his landlord are strained, and *A* does not think that his landlord will consent to his continuing in occupation after the termination of the lease. *A* may, however, be compelled to do so since he has no alternative accommodation, and, assuming he does so and his landlord institutes proceedings, what do you consider to be the maximum amount of damages for which *A* will be responsible, apart of course from the question of costs? We apprehend that *A* will be liable for payment of mesne profits or use and occupation up to the date of actual vacation and that this will presumably be based upon the existing rent and may be double the same. *A* would have no objection to this course, but what he is afraid is that the landlord may also claim heavy damages from him apart from the rent upon the grounds, e.g., that by *A* continuing in occupation he has been unable to sell the property at a good price.

A. *A*'s landlord will be able to claim double value under the Landlord and Tenant Act, 1730, if he gives (before or after term expired) notice demanding possession. So would a purchaser of the reversion, but not the grantee of a new lease commencing after term expired (*Blatchford* v. *Cole* (1858), 5 C.B. (N.S.) 514). This measure would not take into account the possible loss of the profit from some sale, but it is correct that the rent paid hitherto is not the measure; it is, rather, what an occupier would give for the use of the premises, multiplied by two of course (*Robinson* v. *Learoyd* (1840), 7 M. & W. 48). Double value so assessed would be calculated from the date of the expiration of the term, or that of service of the notice if served later than such expiration (*Cobb* v. *Stokes* (1807), 8 East 358), until the "holding over" ceases. It will be appreciated that while being "compelled to continue in occupation" is mentioned, in fact *A* may be compelled to leave (summary procedure being adopted): a claim for recovery of land can be joined with a claim for double value as well as with a claim for mesne profits and damages for failure to deliver up. Indeed, *A*'s landlord will have a right of re-entry without legal process, using no more force than is necessary to overcome any resistance (*Hemmings* v. *Stoke Poges Golf Course* [1920] 1 K.B. 720 (C.A.)). If the landlord sues for mesne profits, the measure is that of value, and this may exceed what was payable as rent (*Clifton Securities, Ltd.* v. *Huntley* [1948] 2 All E.R. 283; 92 Sol. J. 499), being essentially damages for trespass; but a claim for failure to deliver up would sound in contract and would be measured by the real or actual consequential damage sustained (*Watson* v. *Lane* (1856), 1 Exch. 769). This can take into account damages which the landlord may be liable for to other parties by reason of his being prevented from delivering possession to them (*Bramley* v. *Chesterton* (1857), 2 C.B. (N.S.) 144).

NOTES AND NEWS

Honours and Appointments

Mr. William E. James has been appointed clerk to Chalfont St. Peter Parish Council in place of Mr. J. Milliner, who is retiring after 40 years.

Mr. Henry John Hey Lamb takes over the office of clerk to the magistrates at Kettering on 1st May, in succession to his father, Mr. Charles Edward Lamb. As long as Kettering has had a magistrates' clerk, which is for 141 years, the office has been held by a member of the Lamb family.

Mr. William George Eric Lewis has been appointed assistant solicitor to Scarborough Corporation.

Mr. Iorwerth Llewelyn Thomas, assistant solicitor to Wrexham District Council, has been appointed deputy clerk of the council in succession to Mr. S. S. Higginson, who is retiring.

Mr. George Nisbet Waldram, senior assistant solicitor to Wembley Corporation, has been appointed deputy town clerk of Winchester in succession to Mr. Geoffrey Francis Burndred, who has been appointed to a similar post with Gosport Borough Council. Mr. Burndred succeeds Mr. Derek John Lewis Horn, who has been appointed deputy town clerk of Bromley.

The following appointment is announced in the Colonial Legal Service: Mr. W. E. Evans, Resident Magistrate, Northern Rhodesia, to be Puisne Judge, Northern Rhodesia.

Personal Note

Mr. Frank Ernest Charles Forney, solicitor, of Wood Green, London, N.22, was married on 3rd April to Miss Mavis Wilson, of Cockfosters.

Miscellaneous

The next Quarter Sessions for the County Borough of Smethwick will be held at the Law Courts, Crocketts Lane, Smethwick, on Tuesday, 11th May, at 10.30 a.m.

THE SOLICITORS ACTS, 1932 TO 1941

On 9th April, 1954, an order was made by the Disciplinary Committee constituted under the Solicitors Acts, 1932 to 1941, that there be imposed upon Evan Eirwyn Robyns Robyns-Owen, of No. 36 High Street, Pwllheli, Caernarvon, a penalty of fifty pounds (£50), to be forfeit to Her Majesty, and that he do pay to the complainant his costs of and incidental to the application and inquiry.

On 9th April, 1954, an order was made by the Disciplinary Committee constituted under the Solicitors Acts, 1932 to 1941, that there be imposed upon Vivian Meyrick Price, of Lorn Chambers, Tenby, and No. 5 Market Street, Narberth, Pembrokeshire, a penalty of seventy-five pounds (£75), to be forfeit to Her Majesty, and that he do pay to the complainant his costs of and incidental to the application and inquiry.

DOUBLE TAXATION RELIEF: BELGIUM

The Double Taxation Relief Convention with Belgium relating to taxes on income was ratified on 17th March, 1954, and has now been published as the Schedule to an Order in Council numbered S.I. 1954 No. 487.

Wills and Bequests

Mr. S. Brearley, solicitor, of Batley, Yorks, left £4,197 (£3,981 net).

OBITUARY

Mr. E. B. G. GILBERT

Mr. Edward Basil Graham Gilbert, solicitor, of Loddon, Norfolk, died on 14th April, aged 80. From 1927 to 1952 he was clerk to Loddon Bench and until his death he was clerk to the Commissioners of Taxes for the Loddon district and to four internal drainage boards. He was admitted in 1896.

Mr. C. E. E. HOTHERSALL

Mr. Charles Ernest Ellis Hothersall, retired solicitor, of Tewkesbury, died recently, aged 79. He had been clerk of the peace in the borough for many years. He was admitted in 1908.

Mr. H. JEFFERSON

Mr. Harold Jefferson, solicitor, of Belfast, died on 15th April. He was a former president of the Incorporated Law Society of Northern Ireland.

SOCIETIES

The annual dinner of the Mid-Essex Law Society was held at Chelmsford on 26th March, when the president, Mr. Basil H. Bright, M.C., welcomed some ninety members and guests. Amongst the official guests of the Society were the Bishop of Chelmsford, the Rt. Rev. Faulkner Allison, D.D., His Honour Judge Geoffrey Howard (who was also welcomed as an honorary member of the Society), the vice-president of The Law Society, Mr. F. H. Jessop, LL.B., and representatives of neighbouring societies, including the Suffolk and North Essex Law Society, the Southend-on-Sea Law Society, the West-Essex Law Society and the Rural Essex Branch of the Royal Institute of Chartered Surveyors.

The Union Society of London announce the following subjects for debate in May: Wednesday, 5th: Joint Debate with the Gray's Inn Debating Society: "That this House would like to change its sex." Wednesday, 12th: "That this House is losing confidence in the medical profession." Meetings are held in the Common Room, Gray's Inn, at 8.0 p.m.

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Advertisements must be received first post Wednesday.

Contributions are cordially invited and should be accompanied by the name and address of the author (not necessarily for publication).